Supreme Court, U.S.
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NO. 85-1906

In the Supreme Court of the United States

OCTOBER 1985 TERM

ADELFINO ALANIZ, PETITIONER
v.
O.L. McCOTTER, DIRECTOR-
TEXAS DEPARTMENT OF CORRECTIONS,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that petitioner's Fourth Amendment claims were fully and fairly considered in the state appellate court.

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is set forth in appendix one to this petition. The opinion of the Texas Court of Appeals for the Thirteenth Supreme Judicial District is set forth in appendix two to this petition and published at 647 SW2d 310.

STATEMENT OF JURISDICTION

The opinion of the United States Court for the Fifth Circuit was delivered on February 19, 1986. Petitioner's motion for rehearing was overruled on March 21, 1986. The mandate was issued on March 31, 1986. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC §2254.

The Fifth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other circuit Courts of Appeals. *Shoemaker v. Riley,* 459 US 948, 103 SCt 266, 74 LEd2d 207 (1982). Also, the Fifth Circuit Court of Appeals has rendered a decision in conflict with applicable decisions of the Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment, United States Constitution.

"When the court hears objections out of the presence of the jury and rules that such evidence shall be admitted, then in that event such objections shall be deemed to apply to such evidence when it is

admitted before the jury without the necessity of such objections being renewed in the presence of the jury." Article 40.09(6)(d)(3), Texas Code of Criminal Procedure (1965).

STATEMENT OF THE CASE

A. Course of Proceedings

On November 30, 1979, Alaniz was indicted for possession of heroin with a prior felony conviction alleged for enhancement. On January 23, 1980, Alaniz filed a motion to suppress evidence on Fourth Amendment grounds. On January 31, 1980, pretrial was held at which Alaniz' motion was overruled after an evidentiary hearing. On February 25, 1980, at the jury trial the evidence was admitted without objection. On February 26, 1980, Alaniz was found guilty and his punishment assessed at thiry years imprisonment in the Texas Department of Corrections. On March 10, 1980, Alaniz was formally sentenced and gave notice of appeal.

On September 19, 1980, Alaniz filed his brief wherein he complained that the trial court erred in admitting into evidence heroin which was seized contrary to Alaniz' rights under the Fourth Amendment. Alaniz' conviction was affirmed by the Court of Appeals for the Thirteenth Supreme Judical District of Texas on October 28, 1982. The Texas Court of Criminal Appeals refused review of Alaniz' petition for discretionary review on January 27, 1983. Alaniz did not file a petition for writ of certiorari in the United States Supreme Court.

On September 23, 1984, Alaniz filed his petition for habeas corpus under 28 USC §2254 with the United States District Court for the Southern District of Texas, Corpus Christi, Texas. On May 30, 1985, the district court denied Alaniz' petition. On June 10, 1985, Alaniz gave notice of

appeal. On June 21, 1985, the district court issued a certificate of probable cause to authorize an appeal.

Alaniz' appeal was docketed on June 25, 1985. Alaniz filed his brief on August 8, 1985. Respondent filed its brief on October 16, 1985. Alaniz filed his reply brief on October 25, 1985. An opinion denying Alaniz' appeal was issued on February 19, 1986. Alaniz filed a motion for rehearing on March 3, 1986. Alaniz' motion for rehearing was overruled on March 21, 1986. A mandate was issued on March 31, 1986.

B. Statement of the Facts

At the pretrial George Spaulding testified by deposition as follows. He was a DEA Special Agent. On August 23, 1979, he provided information which he had received from an informant to the Corpus Christi Police Department. The informatiion he received from the informant at 7:15 p.m. on August 23, 1979, was as follows. Alaniz would be transportng a quantity of heroin to Remundo De Leon in Corpus Christi, Texas, in either a white over red Pontiac Firebird or a bluish gray 1968 Camaro with body putty all over it. Alaniz would have at least one of his children with him. The heroin would be concealed in the windshield support post of which ever vehicle. The amount of heroin would be in excess of one ounce.

In addition the informant stated as follows. The last place he had seen Alaniz was at his brother's residence at 3723 South Sugar Road, Edinburg. Alaniz was the only person there. Alaniz would be departing from there to go to Corpus Christi with the heroin. Alaniz would be leaving immediately. The informant gave Spaulding the phone number for the residence and suggested that Spaulding call. If no one answered, Spaulding would know Alaniz had probably left. Spaulding called, and no one answered.

Spaulding called the Corpus Christi Police Department and gave the above information to Jesse Garcia. Shortly thereafter, A. L. Leal called back, and Spaulding repeated the above information. Leal asked him whether he had used the informant before. Spaulding said that he had received information from the informant which had been verified before.

At the pretrial A. L. Leal testified by deposition as follows. He was a Corpus Christi Police Department officer working in the narcotics division. Jesse Garcia called him and told him that Spaulding had called. Garcia relayed the information and gave him Spaulding's telephone number. Leal called Spaulding back. Spaulding told him that the informant was reliable. Leal stated that he called Spaulding at 7:45 and left his house at 8:00. At the police station he conferred with other police officers. They decided to place three routes into the city and De Leon's home under surveillance. Everthing was set up by 8:30. Leal estimated that Alaniz would take two and one-fourth to three and one-half hours to get to Corpus Christi depending on how fast he drove.

Leal stated that the Municipal Court magistrate was gone. He felt that he did not have enough time to get a warrant. He would have needed forty-five minutes to an hour to "write up" the warrant and get it signed by a judge. Leal stated that he had gone to the magistrate's home to get a warrant signed before. He had the phone number of the magistrate. If he had to "type up" the warrant, he would have needed an hour and a half to type the warrant, drive to Judge Gonzalez' home, present the warrant, and obtain the magistrate's signature.

At the pretrial Wallace C. Crisp testified as follows. He was a Corpus Christi Police Department officer working

in the narcotiics division. At approximately 8:30 p.m. he began surveillance of Farm Road 665 leading into the city. When he saw a red and white car go by, he followed in his unmarked car. He observed the other car drive erratically, veering across the center stripe. When he got close to the other car, it pulled to the side of the road and stopped. Crisp passed the other car, turned around and came back. When he got behind the other car again, he noticed erratic movement again. The other car pulled off the road again and stopped. Crisp got out of his car with his pistol in one hand and his badge in the other. Alaniz got out of his car and walked to the back of his car. Crisp identified himself and told Alaniz not to move. Alaniz said, "All right." In the meantime two more police officers arrived.

Crisp observed that Alaniz was unsteady on his feet when he got out of his car. He concluded that Alaniz might be intoxicated. Crisp asked for and Alaniz produced a driver's license. Crisp concluded he had the man for whom he was looking. He would not have let Alaniz go with Alaniz' apparent intoxication being part of the reason. Crisp asked Alaniz if the license was his. Alaniz said it was. The two other officers, Galvan and Almanza, came up and engaged Alaniz in coversation, part in English and part in Spanish.

Galvan then told Crisp that he had permission to search the vehicle. Crisp removed the door post molding near the windshield with a screwdriver and discovered the contraband. Crisp returned to the back of Alaniz' vehicle and advised Galvan of what he found. Galvan then read Alaniz his rights and told Alaniz he was under arrest.

At the pretrial Raul Galvan testified as follows. He was a Corpus Christi Police Department officer working in the narcotics section. He and his partner, Officer Almanza,

had set up surveillance on Farm Road 665 prior to the arrival of Crisp. After Crisp had stopped Alaniz, Galvan approached Alaniz and told Alaniz that they had reason to believe that he was carrying contraband in his car and did he mind if they searched his car. Alaniz responded, "Go ahead, you are not going to find anything." Crisp and Almanza were standing close enough to hear.

At the pretrial Ruben F. Almanza testified as follows. He was a Corpus Christi Police Department officer working in narcotics. He heard Crisp ask Alaniz a couple of questions. Then Crisp asked if they could look in Alaniz' vehicle. Alaniz replied in Spanish, "Go ahead, you are not going to find anything." At the time Alaniz was restrained to the extent of having his hands on top of the car trunk. Alaniz' person had already been searched.

At that point no one had read Alaniz the Miranda warnings. Almanza looked into the vehicle and observed a young boy and a young girl. He went to the passenger's side of the car and started looking the area where they had received information the contraband was located, i.e. the windshield molding. Five minutes elapsed between the time Almanza arrived on the scene and the time the contraband was located. Almanza observed that Alaniz was intoxicated. He smelled marijuana smoke in the car. Also, Alaniz had an open beer in the car.

At the pretrial Alaniz testified that he did not give consent to the police officers to search the vehicle. He became apprehensive for his children due to being followed so closely at night. He pulled off the road to let them go past. When he pulled off again, he saw the other vehicle stop. He saw a man get out of the unmarked car with a gun in one hand and a badge in another. Crisp asked him for his driver's license and told him they were going to search his

car. Then Galvan and Almanza arrived. They said, "We are going to search your car." Alaniz said "Just go ahead," since he did not have any choice with three armed officers present.

At the trial on guilt Crisp in addition to his previous testimony indicatd that the stop of Alaniz occurred around 10:00 p.m. Almanza added that the area where the stop occurred was unlighted.

James Waller identified himself as a Texas Department of Public Safety chemist. He analyzed the substance seized by the police as heroin.

Galvan added the following in his pretrial testimony. The stop took place late at night in a secluded area. After Alaniz was handcuffed and given his Miranda warning by Galvan, Crisp and Almanza went back to the vehicle. Whereupon Alaniz said in Spanish, "Why are they going back to the vehicle again? They already found what they was going to find."

Alaniz testified that the vehicle belonged to the business he and his brothers owned and was for sale. He stated that many other people had access to the vehicle. He was going to Corpus Christi for the weekend with his kids. He did not know the car contained heroin. He denied saying the above words attributed to him by Galvan.

SUMMARY OF THE ARGUMENT

No exigent circumstances existed to support the warrantless search of Alaniz' automobile. By the police testimony more than enough time was available to procure a warrant. The state appellate court refused to consider the matter because Alaniz failed to use the words "exigent circumstances" in his pretrial motion to suppress. However, since the burden was on the state to show exigent cir-

cumstances, Alaniz' objection to the search on Fourth Amendment grounds was sufficient. Although the police claimed that Alaniz consented to the search, their discovery of the heroin was the product of their initial illegal stop of Alaniz.

ARGUMENT

A. The *Stone* Background

If the accused has received a full and fair determination of his federal search and seizure complaints in state court, then he is not entitled to relitigate such issues by way of federal habeas corpus. *Stone v. Powell*, 428 US 465, 96 SCt 3037, 49 LEd2d 1067 (1976).

In this case the appellate court was squarely faced with Alaniz' exigent circumstances complaint and intentionally did not consider its merits. The opinion of the state appellate court clearly shows that it not only did not consider the issue fully but also refused to "address" the issue at all. Appendix 2, page A-12.

The state appellate court in its opinion restated some but not all of the important facts bearing on exigent circumstances from the record. For example, "Officer Leal testified that obtaining a warrant could take up to an hour and a half." Appendix 2, page A-12. However, the court omitted to state that Leal, also, testified that the hour and a half maximum was based on his assumption that he had to "type up" the warrant. Statement of Facts, page 34. The omission of the court, no doubt, arose from its decision not to consider the issue. "Appellant's contention in his brief that this estimate was excessive was not raised at trial and *will not be addressed.*" Appendix 2, page A-12, emphasis added.

The federal appellate court in its opinion states that

Alaniz' complaint is that the trial court failed to "credit the evidence which suggested that the police could have obtained a warrant before Alaniz arrived in Corpus Christi." Appendix 1, page A-4. The court states, also, that the state court of appeals "held that the trial court did not err in ruling that exigent circumstances justified a warrantless search." Appendix 1, page A-4. The court states, further, that "the state court of appeals upheld the trial court's finding that "the [time] estimate was reasonable and that procuring a warrant was impractible." Appendix 1, page A-4 to A-5.

Significantly, the federal appellate court never claims or presents any argument that an examination of all the facts in the record supports a finding of exigent circumstances.

Most significantly, the federal appellate court's comments miss the point of Alaniz' argument and misapprehend the holding of the state appellate court. The trial court's failure to credit is but a preamble to the state appellate court's failure to consider. Upholding the trial court's ruling does not amount to considering the trial court's ruling.

The state appellate court did not uphold the trial court on the basis "that procuring a warrant was impracticable." Rather, the state appellate court upheld the trial court on the basis that the issue "will not be addressed." In othe words, the issue of exigent circumstances was not given consideration on its merits on appeal but only upheld by default on appeal. Therefore, Alaniz had been denied full and fair consideration of the exigent circumstances issue on appeal in violation of his Fourth Amendment rights.

B. Procedural Default

This case does not fall into the category of cases which might be barred by *Wainwright v. Sykes,* 433 US 72,

97 SCt 2497, 53 LEd2d 594 (1977) on the basis of a contemporaneous objection procedural default.

In *Riojas v. State*, 530 SW2d 298, 301 (Tex Crim App 1975), Art. 40.09(6)(d)(3) was construed to mean that "...the overruling of *any* pre-trial motion to suppress is sufficient to preserve error in the admission of the evidence made the basis of the motion to suppress." In *Writt v. State*, 541 SW2d 424, 426 (Tex Crim App 1976), *Riojas* was qualified "to limit it to situations...where the hearing on the pre-trial motion to suppress is supported by evidence and the contention on appeal is the same as that presented to the trial court at such hearing."

As a general rule, specific objections to the admission of evidence must be made to present error on appeal. *Goodrich v. State*, 632 SW2d 349 (Tex Crim App 1982). The basis of the rule is to inform the trial judge of the basis of the objection and afford him an opportunity to rule on it and to afford opposing counsel an opportunity to remove the objection or supply other evidence. *Darland v. State*, 582 SW2d 452, fn7 (Tex Crim App 1979). *Maynard v. State*, 685 SW2d 60 (Tex Crim App 1985). Thus, as an exception, a general objection will suffice where the correct ground of exclusion is obvious to the trial judge and opposing counsel. *Zillender v. State*, 557 SW2d 515 (Tex Crim App 1977).

The citation relied on by the federal appellate court in its holding that Alaniz procedurally defaulted in the trial court on exigent circumstances, to wit: *Dill v. State*, 697 SW2d 702 (13th Dist.-1985 no pet) is not in fact an opinion of the Texas Court of Criminal Appeals, but rather an opinion of the Texas Thirteenth Court of Appeals. In other words, *Dill* is not an expression of Texas criminal law from the highest Texas appellate court with criminal jurisdiction. Furthermore, *Dill* does not deal with the

sufficiency of pretrial objections to a warrantless search. The applicable cases on the sufficiency of pretrial search objections from the Texas Court of Criminal Appeals do not justify holding a procedural default occurred in the trial court in this case.

Alaniz did not fail to object on Fourth Amendment grounds at the trial level nor fail to take a direct appeal on such grounds. The absence of the magic words "exigent circumstances" from Alaniz' motion to suppress simply does not amount to an adequate basis for the state appellate court to intentionally refuse to consider whether that important aspect of Alaniz' federal rights were violated.

It should be remembered that the context of this case is that of a search where the burden is on the prosecution to go forward and prove that both probable cause and exigent circumstances combined to justify a warrantless search. *Whitely v. Warden,* 401 US 560, 91 SCt 1031, 28 LE2d 306 (1971). *Coolidge v. New Hampshire,* 403 US 443, 91 SCt 2022, 29 LEd2d 565 (1971).

Probable cause and exigent circumstances go hand in glove in any warrantless search situation. Before any evidence is heard the prosecutor knows he must show exigent circumstances to uphold his search and the trial court knows it must find exigent circumstances before admitting any seized evidence. The accused puts the prosecution to this burden by simply complaining that the search and seizure was illegal. In other words, an accused need only object to a warrantless search on general search and seizure grounds and need not negate every possible exception to the presumed illegality of warrantless searches in the form of objections. Rather, once an accused has objected to a warrantless search on general search and seizure grounds, the state must go forward and prove some exception exists.

Thus a prosecutor in any warrantless search situation knows a priori that he will not only have the *opportunity* to supply evidence of exigent circumstances and to remove any objections to the existence of exigent circumstances but rather has the *obligation* to do so. Likewise, a trial judge in any warrantless search situations knows a priori that he will not only have an *opportunity* to rule whether or not exigent circumstances exist but has an *obligation* to do so. Therefore, the *Darland/Maynard* rationale has no application in the context of this case.

In this case, the prosecution had four months to look at Leal's deposition. There is just no excuse for the prosecution not to have noticed that it had a problem on its burden of exigent circumstances.

Also, the prosecution was put on notice of an exigent circumstances complaint by the defense at the pretrial stage. If the prosecution had read the last two cases cited by the defense in its motion to suppress, the prosecution would have clearly seen that the defense was challenging on the issue of exigent circumstances in this case. In *United States v. Chadwick,* 433 US 1, 97 SCt 2586, 53 LEd2d 538 (1977), the defense motion to suppress was upheld because there were no exigent circumstances to justify the search. In *Arkansas v. Sanders*, 442 US 753, 99 SCt 2586, 61 LEd2d 235 (1977), the defense motion to suppress was upheld because there were no exigent circumstances to justify the search. These are United States Supreme Court exigent circumstances cases pure and simple.

The citation of the above authorities in defendant's motion to suppress shows that the defense put the prosecution on notice with regard to the issue of exigent circumstances. If the prosecution prior to the pretrial hearing had carefully reviewed the above authorities and carefully

reviewed Leal's deposition, the prosecution would have known they had a problem with exigent circumstances.

The prosecution had plenty of time to get prepared on exigent circumstances. That they failed to do so is nobody's fault but their own. In fact, the defense facilitiated the prosecution's meeting its burden by obtaining the deposition of Leal well in advance and by citing exigent circumstance authority well in advance. Therefore, the prosecution's reliance on the contemporaneious objection rule is misplaced. The goals of the contemporaneous objection rule were achieved in this case. The prosecution had all the time in the world to "remove the objection or supply other testimony."

In other words, Alaniz adequately raised the issue of the violation of his Fourth Amendment rights at the trial level. The admission of the evidence seized pursuant to the search was the whole case against Alaniz and, obviously, prejudicial to him.

C. Exigent Circumstances

A warrantless search must be supported by exigent circumstances, i.e. by proof that there is no time to procure a warrant because the offender is about to escape. While exigent circumstances are usually present when a vehicle is involved they are not always present so as to meet the requirements of the Fourth Amendment. *Coolidge,* above.

In this case the record is so well developed as to clearly indicate that exigent circumstances were not present. Leal testified that a magistrate was available and that he could have obtained a warrant in forty-five minutes to one hour from the time he started preparing the warrant until the time he obtained the judge's signature.

Spaulding testified that the informant called him at

7:15 p.m. to say Alaniz was leaving immediately. Leal estimated that the trip would take two hours and fifteen minutes to three hours and thirty minutes. Assuming Alaniz left as early as 7:15 p.m. he would be arriving no sooner than 9:30 and possibly as late as 10:45.

Even if Leal had not sought to obtain a warrant until the surveillance was all set up at 8:30, he still would have had the hour he needed to obtain a warrant. Leal's claim that he didn't think he had time to obtain a warrant is not even supported by his own facts and figures.

Apparently, Leal picked up a suggestion from the prosecutor's question that the warrant had to be "typed up" which lead him to add to the time he needed to get a warrant signed. Apparently, the Corpus Christi police force labors under the delusion that search warrant applications must by "typed up." Of course, nowhere in any constitution, statute, rule of procedure, or case law applicable to this issue is there any requirement that search warrant applications must be "typed up." On the contrary, the courts have gone out of their way to point out to law enforcement that such formalisms are not required. *United States v. Ventresca*, 380 US 102, 85 SCt 741, 13 LEd2d 684 (1965). A delusive belief in the need to type up a search warrant application cannot be a basis for exigent circumstances. In other words, the one hour and thirty minute revised estimate by Leal was far too long.

Furthermore, the police had time to get together at the Corpus Christi police station and plan four locations to be placed under surveillance which indicates both the availability of time and manpower. Planning and action to obtain a warrant should have commenced with and been an integral part of the overall action of the police. However, no actual effort was made nor were any plans considered to ob-

tain a search warrant. In other words, the failure of the Corpus Christi police officers to obtain a search warrant was due to lack of interest, not a lack of time. In this case, then, it is clear that the prosecutor has failed to meet his burden on exigent circumstances.

D. Fruit of the Poisonous Tree

Where the consent was obtained by exploitation of an initial illegal arrest or seach, any evidence seized pursuant to the consent search must be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States,* 371 US 471, 83 SCt 407, 9 LEd2d 441 (1963). Consent can't be decided in a vacuum. *United States v. Watson,* 423 US 411, 96 Sct 820, 46 LEd2d 598 (1976).

The state trial court initially denied Alaniz' motion to suppress. Statement of Facts, page 96. After Alaniz put on further evidence on the issue of consent the state trial court again denied Alaniz' motion to suppress. Statement of Facts, page 102. However, the state trial court never made any findings of fact that Alaniz consented to the search. While the state appellate court stated that the record supported "a determination that appellant consented to the search of his automobile" (Appendix 1, page A-4), it did not so hold as the basis for its decision. Rather, the state appellate court based its decision on its holding that the search was supported by probable cause. Neither the state appellate court nor the federal appellate court have faced the issue of whether or not the consent, if any, was obtained by the exploitation of an illegal stop of Alaniz.

It is clear from the record that Alaniz was stopped based on the information supplied by the informant, not on any traffic offense or intoxication. Alaniz' erratic driving and apparent intoxication were but incidental factors in the police officer's unwerving quest to unscrew the windshield molding. Alaniz' consent was sought only to expedite that

quest and was clearly a fruit of a poisonous tree. In other words, the search of Alaniz was an illegal invasion of his federal Fourth Amendment rights. In this case, the issue of consent can't be separated from the issue of exigent circumstances. Only if the stop of Alaniz was lawful can consent come into play. There was no legal stop in this case because there were no exigent circumstances. Therefore, consent is not a basis for upholding the search in this case.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that his petition for writ of certiorari should be granted.

CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing brief for appellant were delivered to Jane A. Peddicord, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, attorney for respondent-appellee, by First Class United States Mail this eighth day of May, 1986.

CERTIFICATE OF MAILING

The undersigned certifies that the foregoing document has been deposited in the United States Mail, with first class postage prepaid, properly addressed to the Clerk of the United States Supreme Court within the time allowed for filing.

Respectfully submitted,

/s/ Donald B. Dailey, Jr.
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STATE OF TEXAS *
COUNTY OF NUECES * AFFIDAVIT
*

On this day Donald B. Dailey, Jr. personally appeared before me and stated under oath that the foregoing Certificate of Mailing is true and correct.

/s/ Donald B. Dailey, Jr.
DONALD B. DAILEY, JR.

SUBSCRIBED AND SWORN to before me this eighth day of May, 1986.

/s/ Ernestina Valenzuela
NOTARY PUBLIC--State of Texas

Norary's Printed Name:
ERNESTINA VALENZUELA

My commission expires on:
December 23, 1989

APPENDIX ONE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2437
Summary Calendar

ADELFINO ALANIZ,
Petitioner-Appellant,

versus

O. L. McCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(February 19, 1986)

Before RUBIN, JOHNSON and JONES, Circuit Judges.

JONES, Circuit Judge:*

Because we find that petitioner's fourth amendment claims were fully and fairly considered in state court proceedings, Alaniz v. State, 647 S.W.2d 310 (Tex. App.--Corpus Christi 1982; pet. ref'd, 1983), we AFFIRM the district court's dismissal of this habeas corpus petition.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS

At 7:15 p.m. on August 23, 1979, special agent George Spaulding of the Drug Enforcement Agency received a call from a reliable informant. The informant advised him that Adelfino Alaniz was transporting one ounce of heroin from Edinburg, Texas, to Corpus Christi. Corpus Christi is less than 160 miles from Edinburg, and the trip ordinarily takes at least two hours. Spaulding first verified that Alaniz had left Edinburg and then called Corpus Christi Police Department narcotics officer Leal with whom he spoke sometime between 7:30 and 7:40 p.m. Officer Leal arrived at the police station a little after 8:00 p.m., called in additional police officers, and, by 8:30 p.m., had instituted surveillance along three routes into Corpus Christi. No effort was ever made to obtain a search warrant, which could have taken forty-five minutes but more probably would have taken an hour and a half.

At approximately 10:35 p.m., Alaniz arrived at one of the surveillance points driving erratically. A police officer stopped him. When two other officers arrived, the police announced their intention to search the vehicle and Alaniz said, "Go ahead." The officers discovered a packet of heroin under the windshield support post, where the informant had indicated it would be.

At trial, Alaniz moved to have the heroin suppressed, contending that it had been seized without probable cause and that he had not consented to the search of his automobile. The motion was denied and the jury convicted Alaniz of possession of heroin with his sentence, enhanced by a prior felony conviction, assessed at 30 years imprisonment. Alaniz direct appeal was unsuccessful and a petition for discretionary appeal was rejected. The state concedes that Alaniz has exhausted his state remedies regarding his fourth amendment claim.

Alaniz filed a federal habeas petition, alleging that his conviction had been based on the use of evidence obtained in violation of the fourth amendment. A United States magistrate recommended dismissal, and the trial judge adopted that recommendation and dismissed the petition. Alaniz filed timely notice of appeal, and the trial judge granted a certificate of probable cause.

II. DISCUSSION

Alaniz purports to raise five issues on appeal, but in fact raises only one: whether the heroin must be suppressed because it was seized in violation of the fourth amendment. The heroin in Alaniz' case was seized following a search conducted without a warrant. A warrantless search and seizure is proper only if there was probable cause for the search and if there were exigent circumstances to justify the failure to obtain a warrant. *See Chambers v. Maroney,* 399 U.S. 42, 51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). A warrant also is not necessary if the search is consensual. *Katz v. United States,* 389 U.S. 347, 358 n. 22, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In challending the seizure of the heroin on fourth amendment grounds on a collateral attack, Alaniz is "asking society to redetermine an issue that has no bearing on the basic justice of his incarceration." *Stone v. Powell,* 428 U.S. 465, 491 n.31, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). This is ordinarily improper: "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconsitutional search or seizure was introduced at his trial." *Id.* at 494. Where facts are in dispute, "full and fair consideration requires consideration by the

factfinding court, and at least the availability of meaningful appellate review by a higher state court." *O'Berry v. Wainwright*, 546 F.2d 1204, 1213 (5th Cir. 1977).

At a pretrial motion to suppress, Alaniz had an opportunity to present evidence that he had not consented to the search. The trial court rejected his contention. Alaniz attacked this ruling on appeal and the appellate court held that the trial court had not erred in finding consent. Thus the fact-finding court considered Alaniz' consent claim and the state court of appeals reviewed the trial court's finding; the claim was given "full and fair consideration." *O'Berry v. Wainwright*, 546 F.2d at 1213.

At a suppression hearing, Alaniz advanced the claim that the police lacked either probable cause or exigent circumstances. Following a full hearing on the issue, the trial court denied the motion. The state court of appeals found that there was probable cause for the search. It held that the trial court did not err in ruling that exigent circumstances justified a warrantless search. Alaniz nonetheless argues that the exigent circumstances issue was not adequately addressed because the fact-finder failed to credit the evidence which suggested that the police could have obtained a warrant before Alaniz arrived in Corpus Christi. There was evidence that if the police had moved quickly and encountered no delays and if Alaniz had not transported the heroin with unexpected haste, with split-second timing, it might have been possible to obtain a warrant prior to Alaniz' arrival. The trial court's failure to conclude that since these things could have happened they would have happened and that a warrant was therefore necessary, however, hardly amounts to a failure to give Alaniz' fourth amendment claim full and fair consideration. The state court of appeals upheld the trial court's finding

that "the [time] estimate was reasonable and that procuring a warrant was impracticable." 647 S.W.2d at 314.[1]

Because both the state trial court and a state appellate court considered and decided the fourth amendment claim, we AFFIRM the dismissal of Alaniz' habeas petition.

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[1] In discussing the matter of exigent circumstances, the appellate court declined to address the merits of Alaniz' challenge to the time estimate, because he had failed to raise the issue in the trial court. Under Texas law, failure to make a timely and proper objection waives any error in the admission of evidence. *Dill v. State*, 697 S.W.2d 702, 709 (Tex. Crim. App. 1985) (citing *Boulware v. State*, 542 S.W.2d 677, 682 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 959 (1977). The refusal of petitioner's procedural default suffices under *Berry v. Wainright*, 546 F.2d at 1218, as "meaningful appellate review by a higher state court."

APPENDIX TWO

(NUMBER 2098cr)

NUMBER 13-81-109-CR

COURT OF APPEALS

THIRTEENTH SUPREME JUDICAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * * * *

ADELFINO ALANIZ, APPELLANT,

V.

STATE OF TEXAS, APPELLEE.

* * * * * * *

On appeal from the 319th Disrict Court of Nueces County, Texas.

* * * * * * *

Before Paul W. Nye, C.J., Norman Utter and Raul A. Gonzalez, J.J.

* * * * * * *

OPINION

Appellant was convicted of possession of herion by a jury which assessed punishment, enhanced by a prior felony conviction, at thiry years imprisonment. We affirm.

In his first three grounds of error, appellant contends that the trial court erred by admitting heroin into evidence which was seized contrary to his rights (1) under the Fourth and Fourteenth Amendments to the United States Constitution; (2) under Article 1, Section 9 of the Texas Constitution; and (3) under Article 14.4 of the Texas Code of Criminal Procedure.

At the pre-trial hearing on the Motion to Suppress Evidence, Special Agent George Spaulding of the Drug Enforcement Agency testified by deposition that about 7:15

p.m. on August 23, 1979, he received a phone call at his residence in McAllen, Texas from an unnamed informant who alleged that appellant, Mr. Alaniz, accompanied by at least one of his children, was immediately departing Edinburg, Texas for Corpus Christi, Texas with slightly more than one ounce of heroin concealed in the windowshield support post of either a white-over-red Pontiac Firebird or a bluish-gray 1968 Camaro with "body putty all over it." The informant gave Agent Spaulding the telephone number of the residence Mr. Alaniz was departing, stated that Mr. Alaniz was the only person there, and added that if no one were to answer a telepone call to that number, Mr. Alaniz could be presumed to have departed for Corpus Christi. Mr. Alaniz was known to Agent Spaulding.

Agent Spaulding telephoned the Edinburg number but on one answered. He then telephoned the Corpus Christi Police Department, asking for Narcotics Officer Leal, who returned the call about 7:30 or 7:40 p.m. Agent Spaulding related what he had been told by the informant, and stated that he had received information from this informant, and stated that he had received information from this informant before which had been verified. Officer Leal drove to the police station, called in some other police officers, and instituted surveillance along three routes entering Corpus Christi. There was no attempt to obtain any warrant.

Captain Wallace Crisp, who had been notified by Officer Leal of the information given by the informant, testified that he established surveillance along Farm Road 665 about 8:30 p.m. When an automobile corresponding to the description of the white-over-red Pontiac drove past him, Captain Crisp followed it, noting that the driving was erratic; apparently, the car was straying from its line of

traffic, veering across the center stripe, and travelling approximately forty miles per hour. As he approached the vehicle, it slowed, pulled over, and stopped. Captain Crisp passed by and turned around, but again the automobile pulled over as he neared it. This time Captain Crisp also stopped, displayed his badge, and directed the operator not to move his vehicle. On examination of the driver's license, he noted that the name was that of the appellant, Mr. Alaniz. In addition, Captain Crisp observed that Mr. Alaniz was unsteady on his feet and appeared intoxicated.

Officers Galvan and Almanza soon arrived in an unmarked pick-up truck. Neither officer was in uniform. Officer Almanza testified that there were two young children in the automobile, that he could smell marijuana smoke, and that there was an open beer in the automobile.

Captain Crisp then removed the passenger-side windshield support post and a piece of molding, beneath which he found heroin. Appellant insists that consent to the warrantless search was never given. At the pre-trial hearing on the Motion to Suppress Evidence, appellant contended that the heroin was inadmissible because (1) the search was performed without probable cause and, (2) lacking probable cause, the search could nott be justified by establishing that appellant had consented to it. The trial court overruled appellant's Motion, thus preserving his right to appellate review. *Riojas v. State,* 530 S.W.2d 298 (Tex.Crim.App. 1975).

"Probable cause for a search exists where the facts and circumstances within the knowledge of the officer on the scene and of which he had reasonably trustworthy information would lead a man of reasonable caution and prudence to believe that he will find evidence pertaining to a crime." *Quilice v. State,* 624 S.W.2d 940 (Tex.App.--San

Antonio 1981, no pet). The requirement of "reasonably trustworthy information" is satisfied when there are underlying cirumstances from which the officer could conclude that the undisclosed informant providing the information was credible or his information reliable. *Aguilar v. Texas,* 378 U.S. 108 (1964). This standard is met when the officer affirms that he has received information from the undisclosed informant on previous occasions and that such information has proved to be true and correct. Carmichael v. State, 607 S.W.2d 536 (Tex.Crim.App. 1981). In assessing the sufficiency of the probable cause to search a suspect, the court may also consider the accuracy of the information supplied by the informant as verified by the officer, as well as the specificity of that information. *Draper v. U.S.,* 358 U.S. 307 (1959). "The question of whether a warrantless search is constitutionally valid can only be decided in terms of the concrete factual situation presented by each individual case." *Nastu v. State,* 589 S.W.2d 434 (1979).

In this case, Agent Spaulding testified that his informant had provided verified information on previous occasions. The nature of the information was specific and its accuracy was confirmed in each detail, justifying a man of reasonable caution in concluding that the crucial information would also be accurate; that is, that heroin lay concealed in the windshield support post.

Appellant relies heavily on the reasoning developed in *Aguilar, supra,* 378 U.S. 108 and *Spinelli v. U.S.,* 393 U.S. 410 (1969), in which the United State Supreme Court addressed the circumstances under which probable cause to search for contraband might arise after peace officers received information from unnamed informants. Although a preference for searches made with a warrant was

repeatedly empahsized in *Aguilar,* the analysis for whether information supplied by an informer constitutes probable cause for a search with or without a warrant has now merged. *Spinelli,* 393 U.S. at 417, n. 5. See also *Hicks v. State,* 545 S.W.2d 805 (Tex.Crim.App. 1977).

The Aguilar case established a two-fold test, requiring generally that an affidavit be based on "reliable information from a credible person." First, there must exist more than mere suspicion and belief without any statement of adequate supporting facts; since the magistrate will examine the facts for himself to determine whether the warrant will issue, the underlying circumstances must be stated. Second, there must be an affirmative allegation that the affiant spoke with personal knowledge - not a mere suspicion, belief, or conclusion that certain circumstances exist. Thus, the persons attempting to obtain a search warrant must state why their source is reliable.

In *Spinelli*, the Court expanded the Aguilar concept by adding that (1) the affiant-officer must support his claim that the informant was credible or the information was reliable, and (2) if there is no statement in the affidavit detailing how the information was gathered, it is important that the informant's information describe the defendant's criminal activity in detail sufficient enough to assure the magistrate that he is relying on something more substantial than causual rumor; that is, underlying circumstances must be set forth so that the magistrate may independently judge the validity of the informant's conclusion. Noted as exemplifying proper police work was *Draper, supra,* 358 U.S. 307, which was cited in Spinelli, 393 U.S. at 416.

> "The detail provided by the informant...provides a suitable benchmark. Which Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he

> reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford went on to describe, wiith minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such a detail, could reasonably infer that the informant had gained his information in a reliable way."

The parallels between Draper and the case before us are unmistakable. In this case, the informant did not state the way he had obtained his information. However, he knew that appellant was leaving Edinburg immediately by automobile on his way to Corpus Christi. He knew that at least one child would accompany appellant; he described two automobiiles, either one of which might be used by appellant; he knew almost the precise amount of heroin that was being transported; and he described with exactitude the obscure hiding place for the heroin. That he did not describe appellant or his clothes is easily ascribed to the fact that appellant was known to the person to whom the informant relayed his information, and that, since appellant would be driving an automobile, the description of the vehicle would be of far more practical importance.

The concern expressed by the Spinelli court for individual rights is not abandoned here. Uncontroverted testimony offered by the State clearly established reliance on something more substantial than casual rumor circulating in the underworld or mere "police suspicion." There is no suggestion that admitting this heroin into evidence will dilute "important safeguards that assure that the judgement of a disinterested judical officer will interpose itself between the police and the citizenry." *Id.* 393 U.S. at 419.

Similarly, the tests in Aguilar were propounded to quell the concern of the Court that "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the constitution requires, but instead by a police officer "engaged in the often competitve enterprise of ferreting out crime." *Aguilar, supra,* 378 U.S. at 115.

In the case before us, the specificity of the informant's tip, combined with the independent corroboration by the police officers detailed in the statement of facts, establishes sufficient confidence that constitutional safeguards were met, and that probable cause existed to search for heroin in the place specified by the informant.

However, the mere fact that probable cause exists for the search of the automobile will not obviate the necessity for procuring a search warrant unless the search falls within an exception to the general rule such as, in this case, whether exigent circumstances make obtaining a warrant impracticable. *Stoddard v. State,* 475 S.W.2d 744 (Tex.Crim.App. 1972). Appellant therefore contends in his brief that exigent circumstances sufficient to justify the failure to obtain a warrant do exist.

Agent Spaulding spoke to his informant about 7:15 p.m. and to Officer Leal about 7:30 p.m. Officer Leal did not arrive at the police station until about 8:00 p.m.; surveillance was not established until about 8:30 p.m. Appellant could have arrived in Corpus Chriisti as early as 9:30 p.m. This testimony was uncontroverted. Officer Leal testified that obtaining a search warrant could take up to an hour and a half. Appellant's contention in his brief that this estimate was excessive was not raised at his trial and will not be addressed. The trial court, by denying appellant's Motion to Suppress, found that the estimate was

reasonable and that procuring a warrant was impracticable.

Finally, there was a conflict in the testimony on whether appellant consented to the search of his automobile. Voluntariness of consent to search is a question of fact to be determined from the totality of circumstances. *Myers v. State,* 627 S.W.2d 527 (Tex.App.--Forth Worth 1982, pet. ref'd). A finding of fact by the trial judge at a hearing on a motion to suppress will not be disturbed so long as it is supported by the record. *Green v. State,* 615 S..W.2d 700 (Tex.Crim.App. 1980). Officers Galvan and Almanza testified that they asked appellant, "Do you mind if we search your car?", to which appellant replied, "Go ahead. You are not going to find anything." Appellant himself testified that, after the officers told him they were going to search his car, he replied "Just go ahead." The record of the hearing thus supports a determination that appellant consented to the search of his automobile.

We hold that the warrantless search of appellant's vehicle was supported by probable cause. The Motion to Suppress Evidence was properly denied, and appellant's first three grounds of error are overruled.

In his fourth ground of error, appellant challenges the qualifications of a State witness, Special Agent Frank Garcia of the Federal Drug Enforcement Administration and United States Department of Justice. Appellant contends, apparently, that because Mr. Garcia is not a chemist, he is unqualified to offer expert testimony on how many doses a given amount of heroin will supply. Appellant cites no authority for this proposition.

Mr. Garcia testified that he had been instructed in various schools about diluting heroin; that he had actually

cut substances simulating heroin; and that he had "sat down with...heroin violators which we utilize sometimes as informants. Mr. Garcia had been employed by the Federal Drug Enforcement Administration for some six years, and had operated as an undercover agent at least forty times. Appellant presented no evidence demonstrating that Mr. Garcia was unqualified to testify about the number of doses an amount of heroin might supply, the objection stated only he was "not qualified or competent to do so."

"The special knowledge which qualifies a witness to give an expert opinion may be derived entirely from a study of technical works, or specialized education, or practical experience, or varying combinations thereof; which is determinative is that his answers indicate to the trial court that he possesses knowledge which will assist the jury in making inferences regarding fact issues more effectively than the jury could do so unaided." *Holloway v. State,* 613 S.W.2d 497 (Tex.Crim.App. 1981). "Whether a witness offered as an expert possesses the required qualifications is a question which rests largely within the discretion of the trial court, and the decision to admit or excluded the proposed opinion testimony will not be disturbed unless a clear abuse of discretion is shown." *Steve v. State,* 614 S.W.2d 137 (Tex.Crim.App. 1981). No abuse of discretion is shown and appellant's fourth ground of error is overruled.

In his fifth and final ground of error, appellant claims that the trial court erred by overruling his Motion to Dismiss for failure to grant a speedy trial under the Speedy Trial Act. This contention is also without merit.

In *Barfield v. State,* 586 S.W.2d 538 (Tex.Crim.App. 1979) the Court stated:

> Once the defendant files his motion to dismiss for failure to adhere to the provisions of the Act, the state must declare its readiness for trial then and

> at the times required by the Act. This declaration is a prima facie showing of conformity to the Act, the defendant demonstrating that the state was not ready for trial during the Act's time limits... At the hearing on the motion to dismiss, the prosecuting attorney stated that he was ready to try the case then and had been ready to try the case ever since the complaint and information had been filed. No evidence was elicited to rebut this statement of readiness and it remained unchallenged. This being the case, we hold that the requirements of the Speedy Trial Act were fulfilled...

Appellant was arrested on August 23, 1979. At his hearing on the Motion to Dismiss, the State announced that it was ready for trial on the date set, and that it had been ready for trial since the grand jury indictment was returned on November 30, 1979. No evidence was elicited to rebut this statement of readiness and it remained unchallenged. All five of appellant's grounds of error are overruled and the judgment of the trial court is AFFIRMED.

NORMAN L. UTTER
Associate Justice

Opinion delivered and
filed this the 28th
day of October, 1982.